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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-575

SMITH JOHN and HARRY SMITH JOHN, *Appellants,*

v.

STATE OF MISSISSIPPI, *Appellee.*

On Appeal From the Supreme Court of Mississippi

and

No. 77-836

UNITED STATES OF AMERICA, *Petitioner,*

v.

SMITH JOHN and HARRY SMITH JOHN, *Respondents.*

On Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF SMITH JOHN AND HARRY SMITH JOHN

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CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
LAWS INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASES	4
A. Federal Court Proceedings Below	4
B. State Court Proceedings Below	5
C. Background of the Choctaw Reservation	6
D. Status of the Choctaws in Mississippi	13
SUMMARY OF ARGUMENT	15
ARGUMENT	17
I. THIS COURT HAS JURISDICTION OVER No. 77-575 AS AN APPEAL	17
II. THE FEDERAL DISTRICT COURT HAD JURISDICTION	21
A. General Law Regarding the Major Crimes Act	21
B. The Choctaw Reservation Is Indian Country	26
(1) The Indian Reorganization Act Applies to the Mississippi Choctaws	29
(2) The Relevant Acts of Congress Are Valid as Applied to the Choctaws	33
(3) The Choctaw Reservation Is Included Within the Terms of 18 U.S.C. § 1151	38
C. Defendant Is An Indian	41
D. Mississippi Has Not Complied with Public Law 280	45
III. THE STATE DISTRICT COURT LACKED JURISDICTION	46
A. The General Rule	46
B. Double Jeopardy Bars the State Reprosecution	51
IV. DOUBTS ARE TO BE RESOLVED IN FAVOR OF THE INDIANS AND OF FEDERAL PROTECTION	52
CONCLUSION	52

Cases: Page

Abbate v. United States, 359 U.S. 187 (1959) 51
Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 52
Antoine v. Washington, 420 U.S. 194 (1975) 19, 23, 37
Apapas v. United States, 233 U.S. 587 (1914) 36
Arizona v. California, 373 U.S. 546 (1963) 25, 37
Baker v. Carr, 369 U.S. 186 (1962) 44
Bankston v. State, 236 So.2d 757 (Miss. 1970) 51
Bantam Books v. Sullivan, 372 U.S. 58 (1963) 18
Bartkus v. Illinois, 359 U.S. 121 (1959) 51
Benton v. Maryland, 395 U.S. 784 (1969) 51
Bowling v. United States, 233 U.S. 528 (1914) 36
Bryan v. Itasca County, 426 U.S. 373 (1976) 52
In re Carmen's Petition, 165 F.Supp. 942 (N.D. Calif. 1958), *aff'd sub. nom.* Dickson v. Carmen, 270 F.2d 809 (9th Cir. 1959), *cert. denied*, 361 U.S. 934 47
Charleston Federal Savings & Loan Assn v. Alderson, 324 U.S. 182 (1945) 19
Choate v. Trapp, 224 U.S. 665 (1912) 19
Choctaw Nation v. United States, 81 Ct.Cl. 1 (1935), *cert. denied*, 296 U.S. 643 .....9, 10, 42
Clairmont v. United States, 225 U.S. 551 (1912) 39
Commonwealth v. Mills, 447 Pa. 63, 286 A.2d 638 (1971) 51
Creek County v. Seber, 318 U.S. 705 (1943) 36, 37
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) 18
DeCoteau v. District County Court, 420 U.S. 425 (1975) 26, 40
Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) 34, 44, 45
Donnelly v. United States, 228 U.S. 243 (1913) ...22, 23, 24, 26, 37
Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1857) .. 19
Fisher v. District Court, 424 U.S. 382 (1976) 47
Fiske v. Kansas, 274 U.S. 380 (1927) 18
Hallowell v. United States, 221 U.S. 317 (1911) 36
In re Heff, 197 U.S. 488 (1905) 50
John v. State, 347 So.2d 959 (Miss. 1977) 2
The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) .15, 19, 50
Keeble v. United States, 412 U.S. 205 (1973) 5, 23, 47
Kennerly v. District Court, 400 U.S. 423 (1971) 46
Ex parte Konaha, 43 F.Supp. 747 (E.D. Wis. 1972), *aff'd*, 131 F.2d 737 (7th Cir. 1942) 47

Page

Lone Wolf v. Hitchcock, 187 U.S. 553 (1902) 34, 44
Mattz v. Arnett, 412 U.S. 481 (1973) 22
Maynor v. Morton, 510 F.2d 1254 (D.C. Cir. 1975) 29
McClanahan v. Arizona Tax Com'n. 411 U.S. 164 (1973) 19, 23, 36, 37, 47, 48, 52
McKay v. Kalyton, 204 U.S. 458 (1907) 19
Menominee Tribe v. United States, 391 U.S. 404 (1968) 43
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) . 35
Minnesota v. Hitchcock, 185 U.S. 373 (1902) 25
Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 47, 48
Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) 48
New York ex rel. Cutler v. Dibble, 62 U.S. (21 How.) 366 (1859) 19
New York ex rel. Ray v. Martin, 326 U.S. 496 (1946) .. 48
The New York Indians, 72 U.S. (5 Wall.) 761 (1867) .. 19
Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) 31
Ex Parte Pero, 99 F.2d 28 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 47
Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U.S. 162 (1917) 18
Pronovost v. United States, 232 U.S. 487 (1914) 24, 26
Rice v. Olson, 324 U.S. 786 (1945) 47
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) ..26, 34, 40, 45
Seymour v. Superintendent, 368 U.S. 351 (1962) ..38, 39, 47
Short v. United States, 486 F.2d 561 (Ct.Cl. 1973), *cert. denied*, 416 U.S. 961, *reh. denied*, 417 U.S. 959 ... 22
Sizemore v. Brady, 235 U.S. 441 (1914) 19
Spalding v. Chandler, 160 U.S. 394 (1896) 19, 25
State v. Campbell, 53 Minn. 354, 55 N.W. 553 (1893) .. 50
Tiger v. Western Investment Co., 221 U.S. 286 (1911) .19, 36
Tonasket v. Washington, 411 U.S. 451 (1973) 19
Tubby v. State, 327 So.2d 272 (Miss. 1976) 14, 21, 33, 46
Tulee v. Washington, 315 U.S. 681 (1942) 19
United States v. Antelope, 430 U.S. 641 (1977) ...23, 42, 49
United States v. Boyd, 83 F. 547 (4th Cir. 1897) 35
United States v. Candelaria, 271 U.S. 432 (1926) 44
United States v. Celestine, 215 U.S. 278 (1909) .23, 26, 36, 39
United States v. Chavez, 290 U.S. 357 (1933) 24, 26

Page

United States v. Forty-three Gallons of Whiskey (Lariviere), 93 U.S. 188 (1876) 44
United States v. Heath, 509 F.2d 16 (9th Cir. 1974) ... 43
United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866) 44
United States v. Hornbuckle, 422 F.2d 391 (4th Cir. 1970) 48, 49
United States v. John, 560 F.2d 1202 (5th Cir. 1977) .. 2
United States v. Kagama, 118 U.S. 375 (1886) ...22, 23, 37, 47, 49, 52
United States v. Lossiah, 537 F.2d 1250 (4th Cir. 1976) 48
United States v. Martine, 442 F.2d 1022 (10th Cir. 1971) 40
United States v. Mazurie, 419 U.S. 544 (1975) 23
United States v. McBratney, 104 U.S. 621 (1881) 48
United States v. McGowan, 302 U.S. 535 (1938) ..24, 25, 26, 28, 32, 37, 40
United States v. Mississippi Tax Com'n, 505 F.2d 633 (5th Cir. 1974), *rehearing denied,* 535 F.2d 300 (1976), *rehearing en banc denied,* 541 F.2d 469 (1976) 34
United States v. Nice, 241 U.S. 591 (1916) 36, 50
United States v. One Chevrolet Automobile, 16 F.Supp. 453 (D.Nev. May 1936), *aff'd sub. nom.,* United States v. McGowan, 89 F.2d 201 (9th Cir. March 1937), *reversed,* 302 U.S. 535 (Jan. 1938) 32, 37
United States v. Pelican, 232 U.S. 442 (1914) ..24, 25, 26, 40
United States v. Ramsey, 271 U.S. 467 (1926) 24, 26, 40
United States v. Rickert, 188 U.S. 432 (1903) 36
United States v. Sandoval, 231 U.S. 28 (1913) ...24, 25, 26, 35, 36, 44
United States v. Soldana, 246 U.S. 530 (1918) 39
United States v. Thomas, 151 U.S. 577 (1894) 39
Ex Parte Van Moore, 221 F. 954 (D. S.Dak. 1915) 47
Warren Trading Post Co. v. Arizona Tax Com'n, 380 U.S. 685 (1965) 19
Williams v. Lee, 358 U.S. 217 (1959) 19, 23
Williams v. United States, 327 U.S. 711 (1946) 24
Winton v. Amos, 255 U.S. 373 (1921) 14, 35
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 13, 19
Youngbear v. Brewer, 415 F.Supp. 807 (N.D. Iowa 1976), *aff'd* 549 F.2d 74 (8th Cir. 1977) 47, 52

Page

CONSTITUTIONS, STATUTES AND TREATIES:

U.S. Constitution, Fourteenth Amendment 51
U.S. Constitution, Article I, § 8, cl. 17 (Arsenals and Dockyards Clause) 21, 33, 37
U.S. Constitution, Article VI, § 2 (Supremacy Clause) . 18
Mississippi Constitution, Article 12, § 241 (1890) 14
Mississippi Act of February 4, 1829 13
Mississippi Act of January 19, 1830 13
Hutchinson's Code of Mississippi, Ch. 5, Article 13 (1848) 14
Mississippi C.Rev. of 1857, Ch. 1, Article 3 14
Mississippi C.Ann. of 1930 (Act of Adoption) 14
Mississippi C.Ann., § 97-3-7(2) (Supp. 1976) 5, 18
7 Stat. 210 (1820) (Treaty of Doak's Stand) 7
7 Stat. 333 (1830) (Treaty of Dancing Rabbit Creek) ..3, 7, 8, 16, 17, 20, 34, 35, 41
11 Stat. 611 (Treaty with the Choctaws and Chickasaws of June 22, 1855) 10
14 Stat. 769 (1866) (Treaty of April 28) 10
29 Stat. 506 (1897) 23
23 Stat. 362 (1885) 22
29 Stat. 487 (1897) 22
43 Stat. 253, as amended, 8 U.S.C. sec. 1401(a)(2) 36
53 Stat. 851 (Miss. Choctaw Statute of 1939) ...3, 4, 12, 15, 20, 27, 30, 31

(Statutes of Removal of Mississippi Choctaws)

5 Stat. 180 (1837) 41
5 Stat. 211 (1838) 41
5 Stat. 513 (1842) 9, 41
9 Stat. 33 (1846) 41

Page

9 Stat. 114 (1846) 41, 42
9 Stat. 145 (1847) 42
9 Stat. 555 (1850) 42
9 Stat. 572 (1851) 42
9 Stat. 587 (1851) 42
10 Stat. 15 (1852) 42
10 Stat. 41 (1852) 42
10 Stat. 226 (1853) 42

(Eligibility of Mississippi Choctaws for Oklahoma Allotments)

30 Stat. 62 (1897) 10, 41
30 Stat. 495 (1898) 10, 41
31 Stat. 221 (1900) 10, 41
32 Stat. 641 (1902) 10, 41
32 Stat. 982 (1903) 10, 41
34 Stat. 325 (1906) 10, 41

(Congressional Appropriations for Mississippi Choctaws)

39 Stat. 123 (1916) 11
40 Stat. 561 (1918) 11
41 Stat. 15 (1919) 11
41 Stat. 420 (1920) 11
41 Stat. 1236 (1921) 11
42 Stat. 570 (1922) 11
42 Stat. 1191 (1923) 11
43 Stat. 409 (1924) 11
43 Stat. 1149 (1925) 11
44 Stat. 461 (1926) 11

Page

44 Stat. 941 (1927) 11
45 Stat. 206 (1928) 11
45 Stat. 1568 (1929) 11
46 Stat. 286 (1930) 11
46 Stat. 1121 (1931) 11

(Amendments to Major Crimes Act and Indian Country Statute)

35 Stat. 1088 (1909) 22
44 Stat. 777 (1926) 22
47 Stat. 336 (1932) 22
63 Stat. 89 (1949) 22
80 Stat. 1100 (1966) 22
82 Stat. 73 (1968) 22
90 Stat. 585 (1976) 22

18 U.S.C. § 113 ..... 4, 5, 20
18 U.S.C. § 1151 ..... passim
(Indian country statute)
18 U.S.C. §§ 1153, 3242 ..... passim
(Indian Major Crimes Act)
18 U.S.C. § 1156 (41 Stat. 4, 1919) 23
18 U.S.C. § 1162 and 28 U.S.C. § 1360, as amended, 25 U.S.C. §§ 1321-1326 ..... 17, 26, 45, 46
(Public Law 280)
25 U.S.C. § 232 26
25 U.S.C. §§ 461-79 ..... passim
(Indian Reorganization Act)
25 U.S.C. § 564 ..... 42, 43
25 U.S.C. § 903, repealing 25 U.S.C. §§ 899-902 43
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1257 ..... 2, 3, 15, 17, 18, 19, 20, 21

Page

28 U.S.C. § 2103 2
Rev. Stat. 2133, as amended, 25 U.S.C. § 264 23
Rev. Stat. 2139, as amended, 18 U.S.C. § 1154 23
Rev. Stat. 2141, now 25 U.S.C. § 251 23
Rev. Stat. 2145-46, as amended, 18 U.S.C. § 1152 23

OTHER:

25 C.F.R. part II 47
9 Fed. Reg. 14907 (1944) 12, 28, 32
H.Rept. No. 194, 76th Cong., 1st Sess. (1939) 12, 31
H.Rept. No. 1804, 73d Cong., 2d Sess. (1934) 30
H.Rept. No. 2049 (Conference Report) 73d Cong., 2d Sess. (1934) 30
S. Rept. No. 1080, 73d Cong., 2d Sess. (1934) 30
78 Cong. Rec. 11126 (1934) 29
56 I.D. 137 (1937) 32

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Page

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Pontikes, Dual Sovereignty and Double Jeopardy, 14 Wes.Res.L.Rev. 700 (1963) 51

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---

BRIEF OF SMITH JOHN AND HARRY SMITH JOHN

Harry Smith John died on February 18, 1978, and the cases are therefore moot as to him. The remainder of this brief concerns Smith John alone. Because the

consolidated cases arise from the same events and present closely related issues, this brief is filed for Smith John in both cases. He is referred to herein as defendant, since he was so designated in both trial courts.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi in No. 77-575 is reported as *John* v. *State,* 347 So.2d 959 (Miss. 1977) and is printed in the Appendix to the Jurisdiction Statement, pages 3a-11a.

The opinion of the United States Court of Appeals in No. 77-836 is reported as *United States* v. *John,* 560 F.2d 1202 (5th Cir. 1977) and is printed in the Appendix to the Petition for Certiorari, pages 1A-33A.

JURISDICTION

This Court is believed to have jurisdiction over No. 77-575 as an appeal pursuant to 28 U.S.C. § 1257(1) and/or § 1257(2). In its order of January 16, 1978, the Court postponed the question of jurisdiction, so it is briefed below under Argument part I. In the alternative, the Court is requested to take jurisdiction over the case on certiorari pursuant to 28 U.S.C. § 1257(3) and § 2103. The judgment of the Supreme Court of Mississippi was entered on May 11, 1977, *rehearing denied,* July 20, 1977. A notice of appeal to this Court was filed with the Supreme Court of Mississippi on October 17, 1977, and the appeal was docketed on October 18, 1977.

The jurisdiction of this Court over No. 77-836 is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 11, 1977.

On October 29, 1977, Mr. Justice Powell extended the time for the United States to file a petition for a writ of certiorari to and including December 10, 1977. The United States' petition was filed on December 10, 1977.

LAWS INVOLVED

The following are set out in the Appendix to this brief:

1. The Mississippi Choctaw statute of 1939, Act of June 21, 1939, c.235, 53 Stat. 851;

2. Sections 5, 7, and 19 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 465, 467, 479;

3. The Indian country statute, 18 U.S.C. § 1151;

4. The Indian Major Crimes Act, 18 U.S.C. §§ 1153 and 3242 (pertinent parts);

5. Article 14 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830).

QUESTIONS PRESENTED

1. Where a state court conviction is sustained by the highest court of a state against the contention that state jurisdiction was barred by federal preemption in Indian country, or by double jeopardy, does this Court have jurisdiction on appeal pursuant to 28 U.S.C. § 1257(1) or (2)?

2. Where Choctaw Indians were charged with felony assault within the Choctaw Indian Reservation in Mississippi, did the federal district court have jurisdiction pursuant to the Indian Major Crimes Act (18 U.S.C. §§ 1153, 3242)?

3. Did the Indian Reorganization Act (25 U.S.C. §§ 461-79) and the Mississippi Choctaw statute of 1939

(53 Stat. 851) authorize the Secretary of the Interior to establish the Choctaw Indian Reservation in Mississippi?

4. Is the Choctaw Indian Reservation Indian country within the meaning of 18 U.S.C. §§ 1151 and 1153?

5. Are the Mississippi Choctaw Indians "terminated" from the coverage of the Major Crimes Act and other federal laws applicable to Indians?

6. Is Major Crimes Act jurisdiction over the Mississippi Choctaw Reservation precluded by the Constitution or by the Treaty of Dancing Rabbit Creek?

7. Was state court criminal jurisdiction precluded by federal preemption over Choctaw Indian country?

8. Was state court criminal jurisdiction subsequent to federal trial precluded by the constitutional prohibition against double jeopardy?

STATEMENT OF THE CASES

A. Federal Court Proceedings Below.

Smith John is full-blooded Mississippi Choctaw Indian, a resident of the Choctaw Indian Reservation in Mississippi, and enrolled at the federal Indian agency at Philadelphia, Mississippi. He was indicted by a federal grand jury in October 1975 for assault with intent to kill in Indian country in violation of 18 U.S.C. §§ 113(a) and 1153.[1] Trial was held before a jury in

[1] In pertinent part, the indictment states:

> The Grand Jury charges:
>
> That SMITH JOHN, an Indian, and HARRY SMITH JOHN, an Indian, on or about August 30, 1975, in Leake County, Mississippi, in the NE 1/4 of Section 34, Township 11 N Range 7 E, in the Jackson Division of the Southern District of Mississippi

the United States District Court for the Southern District of Mississippi on December 7-8, 1975. The jury acquitted defendant of felony assault but convicted him of the lesser included offense of misdemeanor assault as defined by 18 U.S.C. § 113(e). He was sentenced to 90 days imprisonment and $300 fine, and that sentence has now been discharged.

Defendant appealed to the Fifth Circuit Court of Appeals, contending that federal Major Crimes Act jurisdiction does not extend to entering a judgment of conviction and sentence on a misdemeanor.[2] The Fifth Circuit *sua sponte* requested briefing of the issue of Major Crimes Act jurisdiction. Both sides supported jurisdiction, but the court disagreed and issued its opinion now on review.

B. State Court Proceedings Below.

In April 1976 (subsequent to the federal trial), defendant was indicted by the Leake County, Mississippi Grand Jury on the charge of aggravated assault in violation of Miss. Code. Ann. sec. 97-3-7(2) (Supp. 1976). Defendants filed motions to dismiss and supporting documents to show that defendant is an Indian; that the acts alleged occurred in Choctaw Indian country; and that defendant had earlier been tried in the federal

> on and within the Choctaw Indian Reservation and on land within the Indian country within the jurisdiction of the United States of America, did then and there knowingly, willfully, unlawfully and feloniously assault with intent to kill the person of Artis Jenkins, in violation of Sections 1153 and 113(a), Title 18, United States Code.

[2] The issue raised involved interpretation of this Court's decision in Keeble v. United States, 412 U.S. 205 (1973). Since that issue was not decided by the Court of Appeals, it is not argued here.

district court for the same offense. He contended that state jurisdiction was barred by federal preemption over Indian country, and in the alternative that state jurisdiction was unconstitutional double jeopardy. The motions to dismiss were denied, and defendant was tried before a jury on May 7, 1976. Uncontradicted trial evidence showed that defendant is a Choctaw Indian and that the acts charged had occurred within the Choctaw Indian Reservation. Defendant was convicted and sentenced to two years in the Mississippi State Penitentiary. That sentence has not been served, as defendant has remained free on bond.

Defendant appealed to the Supreme Court of Mississippi, which affirmed his conviction. The essential basis of the decision was that federal jurisdiction over the offense was lacking.

C. Background of the Choctaw Reservation.

The basic issue in this case is whether the federal actions establishing the Choctaw Indian Reservation in Mississippi were sufficient to come within the Indian Major Crimes Act, 18 U.S.C. §§ 1153, 3242, and the Indian country statute, 18 U.S.C. § 1151. In deciding this issue, both courts below relied on the history of the Choctaws and of the Reservation. A review of that history is therefore in order.

At the time of European discovery, the Choctaws farmed a domain including most of the present State of Mississippi and adjoining parts of Louisiana and Alabama.[3] Their southernmost lands were acquired by

[3] A. DeRosier, The Removal of the Choctaw Indians (U. Tenn. Press, 1970), pp. 9-11, 29.

the European powers, then the United States negotiated several treaty cessions moving the Choctaw border to the north and east.[4] By the 1820 Treaty of Doak's Stand, 7 Stat. 210, the Choctaws ceded about one-third of their remaining lands in Mississippi in exchange for a large tract (then unknown to either treaty party) in what is now Oklahoma, Texas, and Arkansas.[5] This initiated the policy of trying to remove the Choctaws to the West.

The removal question was a major political issue of the 1820's, and the Choctaws demonstrated considerable skill in resisting it. But they were finally forced to agree to cede their remaining tribal lands in Mississippi and remove to the western lands given them in 1820 in the removal Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830).[6]

One of the inducements to persuade the Choctaws to agree to the treaty was its clauses permitting individual Choctaws to remain in Mississippi.[7] Articles 15 and 19 and the supplementary articles reserved lands to certain Choctaw chiefs and other leaders, mostly mixed bloods who later assimilated into white society.[8] Article 14 allowed any other "Choctaw head of a family being desirous to remain and become a citizen of the States"

[4] Id., pp. 14-37.

[5] Id., pp. 29, 53-69.

[6] Id., pp. 70-128.

[7] J. Peterson, the Mississippi Band of Choctaw Indians: Their Recent History and Current Social Relations, (U. of Ga. Ph.D. thesis, 1970, available from University Microfilms, Ann Arbor, Mich., No. 71-13, 106, 1971), p. 15.

[8] Id., pp. 25-27; R. Satz, American Indian Policy in the Jacksonian Era (U. of Neb. Press, 1975), p. 86.

to do so and to receive a "reservation" of one section of land plus additional lands for his children. This grant was to include the existing improvements of the claimant. Article 14 also stipulated that claimants "shall not lose the privilege of a Choctaw citizen."

The specific recipients under articles 15 and 19 of the treaty generally prospered thereafter.[9] A majority of the other Choctaws, particularly the leadership and those more educated and acculturated to white society, removed to Indian Territory.[10] But many Choctaws, mostly full bloods and less assimilated, sought to stay and claim lands under article 14.[11] This was an embarrassment to government agents, who had promised their superiors that virtually all Choctaws would remove.[12] So they simply cheated the Choctaws out of the benefits of article 14 by refusing to provide the lands promised. A 1935 Court of Claims decision described these events:

> [Article 14] is seemingly free from ambiguity. The rights conferred are positive ones, defined with a degree of precision apparently incapable of misapprehension, and notwithstanding this fact the large number of Indians who remained in the State were subjected to a series of maladministration[s] of the article by accredited representatives of the United States that in and of itself discloses an inexcusable, cruel, and unjust procedure never excelled, if equaled, in the history of Indian affairs. Not to exceed 143 heads of families, embracing 276 individual Indians, ever received an allotment

[9] Id.

[10] Peterson, *supra* n.7, pp. 25-27; Satz, *supra* n.8, pp. 70-71, 86.

[11] Peterson, *supra* n.7, pp. 16-21, 25-27.

[12] *Id.*, pp. 18-19.

> under article XIV, and at least 1,155 heads of families embracing at least 3,800 individual Indians were by intimidation, false entries, and destroyed documents cheated out of and denied their rights.[13]

Thereafter efforts were made to rectify the article 14 situation, but Mississippi Congressmen insisted that recompense be made only to those who would remove.[14] An 1842 statute allowed Choctaw claimants to be compensated for their article 14 rights in land scrip, but half the scrip was to be withheld until they removed to Indian Territory.[15] This scheme induced several thousand more Choctaws to remove during the years following; again it was the more acculturated Choctaws who removed.[16] By 1860 the Choctaw population remaining in Mississippi was reduced to about 1,000, although they were enough to form a combat battalion in the Confederate Army.[17] The Choctaws who remained in Mississippi after 1833 generally subsisted as squatters on land they did not own. After the Civil War, they became sharecroppers.[18]

[13] Choctaw Nation v. United States, 81 Ct.Cl. 1, 15-16 (1935), *cert. denied*, 296 U.S. 643. Ironically this decision denied recovery to the Choctaws in Oklahoma for money spent on attorneys to represent the interests of Mississippi Choctaws. The article 14 debacle is described in Satz, *supra* n.8, p. 83, as "one of the most flagrant cases of fraud, intimidation, and speculation ever recorded in American history." *See also*, Peterson, *supra* n.7, pp. 16-22, describing the government agent in charge of article 14 administration.

[14] Satz, *supra* n.8, pp. 83-87; Peterson, *supra* n.7, pp. 23-24.

[15] Act of Aug. 23, 1842, c.187, 5 Stat. 513.

[16] Peterson, *supra* n.7, pp. 25-27.

[17] Id., pp. 24, 50-51.

[18] Peterson, *supra* n.7, pp. 42-50, 54-58.

The Choctaw Nation in Indian Territory negotiated several subsequent treaties with the United States. One of some relevance to the Mississippi Choctaws was the Treaty of June 22, 1855, which provided that "all their subsisting treaty stipulations be embodied in one comprehensive instrument" (preamble) and superseded "all former treaties between the United States and the Choctaws . . ." (article 21).[19] However, the United States later recognized rights under article 14 of the Treaty of Dancing Rabbit Creek.[20] The Treaty of April 28, 1866, 14 Stat. 769, art. 13, required notice to all absent Choctaws of any plan to allot the tribe's lands in Indian Territory, to allow those persons to be able to claim rights in the lands.

Another Choctaw removal was generated by the scheme to allot the Indian Territory lands in preparation for Oklahoma Statehood. Acts of Congress and decisions of the Dawes Commission between 1897-1906 qualified Mississippi Choctaws to receive allotments from the Choctaw lands in the Indian Territory if they would remove.[21] Many Choctaws chose to remove and claim allotments, again generally the more acculturated.[22]

Then began the events leading to reestablishment of federal supervision over the Choctaws in Mississippi.

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[19] 11 Stat. 611, 615. Article 21 includes the phrase "inconsistent with this agreement", following a reference to treaties other than those referred to in the language quoted in the text. The phrase apparently does not refer to the quoted language, although this is not certain.

[20] *See* n.21, *infra* and text. The court in Choctaw Nation v. United States, 81 Ct.Cl. 1, 6 (1935), held that article 14 survived the 1855 treaty.

[21] Act of June 7, 1897, c. 3, 30 Stat. 62, 83; Act of June 28, 1898, c. 517, § 21, 30 Stat. 495, 503; Act of May 31, 1900, c. 598, 31 Stat. 221, 236; Act of July 1, 1902, c. 1362, §§ 41-44, 32 Stat. 641, 651-52; Act of March 3, 1903, c. 994, 32 Stat. 982, 997; Act of June 21, 1906, c. 3504, 34 Stat. 325, 341.

[22] Peterson, *supra* n.7, pp. 90-108.

The Bureau of Indian Affairs sent an agent to report on their condition in 1908.[23] In 1916 Congress appropriated funds "to investigate the condition of the Indians living in Mississippi . . . as to their need for additional land and school facilities. . . ." [24] The resulting reports on the destitute condition of the Mississippi Choctaws led to a 1918 appropriation "for relief of distress among the fullblood Choctaw Indians of Mississippi," allocating funds for an agent, schools, land purchases, and other assistance.[25] Similar appropriations were made every year thereafter through 1931 (fiscal 1932), all for fullblood Mississippi Choctaws.[26]

The Choctaws who had remained were concentrated in east central Mississippi, the heart of their ancient homeland.[27] The federal land purchases made with funds appropriated between 1918-1931 were at seven locations where Choctaws were already concentrated, the villages of Bogue Chitto, Bogue Homo, Conehatta, Pearl River, Red Water, Standing Pine, and Tucker.[28] The purchases were of farmland for individ-

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[23] *Id.*, p. 110.

[24] Act of May 18, 1916, c. 125, § 10, 39 Stat. 123, 138.

[25] Act of May 25, 1918, c. 86, § 9, 40 Stat. 561, 573. *See also*, Annual Report of the Commissioner of Indian Affairs for 1918 (GPO 1918), 83-85.

[26] 41 Stat. 15 (1919); 41 Stat. 420 (1920); 41 Stat. 1236 (1921); 42 Stat. 570 (1922); 42 Stat. 1191 (1923); 43 Stat. 409 (1924); 43 Stat. 1149 (1925); 44 Stat. 461 (1926); 44 Stat. 941 (1927); 45 Stat. 206 (1928); 45 Stat. 1568-69 (1929); 46 Stat. 286 (1930); 46 Stat. 1121 (1931). This list omits a few miscellaneous and supplemental appropriations.

[27] Peterson, *supra* n.7, p. 1-3, 6-8. This area is the location of the most important Choctaw cultural and religious site, the mound of Nanih Waiya. DeRosier, *supra* n.2, pp. 6-7.

[28] These seven villages comprise the Reservation today. Peterson, *supra* n.7, Appendix 2.

ual Choctaws, who were expected to reimburse the Government. But this proved difficult, and during the hard times of the 1930's all defaulted.[29]

In 1934 Congress passed the Indian Reorganization Act (25 U.S.C. §§ 461-79). Section 18 of the Act (25 U.S.C. § 478) required its submission to Indian groups for their determination whether to accept or reject the Act. On March 30, 1935, the Act was voted on by the Mississippi Choctaws, and they accepted it.[30] Thereafter, land purchases were made in common for the Mississippi Choctaws of one-half or more Indian blood pursuant to Sections 5 and 19 of the I.R.A.[31]

In 1939 the Secretary of the Interior asked Congress to take title to the lands acquired under the appropriations of 1918-1931 in trust for the Mississippi Choctaws of one-half or more Indian blood, and Congress did so by the Act of June 21, 1939.[32] One purpose of this statute was to permit the Choctaws to form a tribal government pursuant to Section 16 of the I.R.A. (25 U.S.C. § 476).[33] In 1944, the Secretary of the Interior issued and published a proclamation pursuant to Section 7 of the I.R.A. (25 U.S.C. § 467) to establish the Choctaw lands as an Indian reservation.[34] On May 22,

[29] Peterson, *supra* n.7, pp. 115-23.

[30] T. Haas, Ten Years of Tribal Government under the I.R.A. (U.S. Indian Svc. 1947) p. 17.

[31] Peterson, *supra* n.7, p. 124.

[32] C. 235, 53 Stat. 851, printed in the Appendix to this brief.

[33] H. Rept. No. 194, 76th Cong., 1st Sess. (1939), discussed *infra* at pp. 30-31.

[34] 9 Fed. Reg. 14907 (1944); *see also*, the opinion of the federal court below, Pet. for Cert. pp. 25A-33A.

1945, the Secretary approved a Constitution for the Mississippi Band of Choctaw Indians pursuant to Section 16 of the I.R.A. (25 U.S.C. § 476).[35]

D. Status of the Choctaws in Mississippi.

The foregoing description does not fully address the legal and social situation of the Choctaws in Mississippi. Because some aspects of this situation were relied on by the courts below, a few additional references are required.[36]

One device used to induce the Choctaws to agree to the 1830 removal treaty was enactments of the Mississippi Legislature in 1829 and 1830 purporting to extend state laws over the Choctaws. The Miss. Act of Feb. 4, 1829, declared the Choctaws to be state citizens and subject to state laws, and the Act of Jan. 19, 1830, purported to abolish tribal governments, eliminate all rights under tribal law, and punish anyone holding tribal office.[37] The revised Mississippi Constitution of 1833 provided that the "legislature shall have power to admit to all the rights and privileges of free white citizens of this State all such . . . Indians as shall choose to remain in this State, upon such terms as the legislature may from time to time deem proper."[38]

The statutes of 1829 and 1830 appeared in an 1848 codification but were repealed by omission from the

[35] T. Haas, *supra* n.30, p. 22.

[36] See notes 83-84 and 107 *infra* and text.

[37] Peterson, *supra* n.7, p. 13. These statutes were likely invalid under the rule of this Court's decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[38] Satz, *supra* n.8, pp. 86-87.

1857 Mississippi Code Revised and of all subsequent codes.[39] The 1890 Mississippi Constitution, art. 12, § 241, guaranteed the vote to all adult inhabitants who paid the poll tax except "idiots, insane persons and Indians not taxed." The reference to Indians was deleted by an amendment in 1972.[40]

Whatever the *de jure* situation under these laws, most Mississippi Choctaw Indians were in fact denied civil and political rights of citizens until the 1960's and 1970's.[41]

As already noted the removal policy tended to induce the more assimilated and acculturated Choctaws to migrate to Indian Territory (except for those few claimants under articles 15 and 19). Most Choctaws who remained in east central Mississippi were fullbloods, and the appropriations of 1918-1931 were for fullbloods only. The I.R.A. definitions of halfblood or more has been used since 1935, but the Choctaws remain one of the most traditional and separate Indian communities in the United States. The great majority speak Choctaw as their first language,[42] and virtually all children attend federal Indian schools.[43] Recent economic oppor-

[39] *See* Hutchinson's Code of Miss., ch.5, art. 13-14 at 136 (1848), omitted from the Miss.C.Rev. of 1857. Ch. 1, art. 3 of the latter repealed omitted provisions. *See also* the Act of Adoption, § 15, of the 1930 Miss.C.Ann.

[40] See Tubby v. State, 327 So.2d 272, 287 (Miss. 1976).

[41] Winton v. Amos, 255 U.S. 373, 379 (1921) (". . . they were denied all social and political privileges . . ."); Peterson, *supra* n.7, pp. 219-47; Satz, supra n.8, pp. 86-87.

[42] Peterson, *supra* n.7, p. 8; B. Spencer, *et al.*, Choctaw Manpower and Demographic Survey, 1974 (USOE grant to Miss. Band of Choctaw Indians 1975) p. 16.

[43] Peterson, *supra* n.7, pp. 248-74.

tunities may in time alter the situation, but there can be no doubt that the Mississippi Choctaws remain a "people distinct from others."[44]

SUMMARY OF ARGUMENT

No. 77-575 meets the statutory requisites for an appeal under either 28 U.S.C. § 1257(2) or (1). This Court has reviewed many cases where federally-protected Indian rights were denied by state courts by writ of error and by the modern appeal procedure.

Federal jurisdiction to prosecute defendant depended on applicability of the Indian Major Crimes Act (18 U.S.C. §§ 1153, 3242) and the Indian country statute (18 U.S.C. § 1151). The intent of Congress in enacting Section 1151, as illustrated by numerous decisions of this Court, was to define Indian country as any land or area lawfully reserved or set aside for the residence of Indians under federal supervision. The decisions below seek to carve out a unique exception from these statutes for the Mississippi Choctaws. However, the plain language of the statutes is inclusive of all states and all Indians, and this Court has consistently rejected prior attempts to except particular Indian lands from the statutes. Congress has recognized this rule by enacting specific exceptions.

Federal supervision over the Mississippi Choctaws was reestablished in stages between 1918-1945. The Interior Department submitted the Indian Reorganization Act to the Mississippi Choctaws for their approval and purchased trust land for them under the Act. In 1939 Congress passed a specific statute (53 Stat. 851) placing all Choctaw lands in the same trust status. The

[44] The Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1867).

Act was also intended to facilitate the organization of a tribal government by the Choctaws under Section 16 of the I.R.A. In 1944 the Secretary proclaimed the Choctaw lands to be an Indian reservation pursuant to the authority of Section 7 of the I.R.A.

In 1944 the Major Crimes Act applied within Indian reservations, so the Choctaw Reservation came within its terms at that time. Under the 1948 codification of Indian Country, 18 U.S.C. § 1151, the Choctaw Reservation is Indian country under Section 1151(a) and Section 1151(b).

The opinions below purport to avoid this conclusion by construing the Indian Reorganization Act not to apply to the Mississippi Choctaws. However, that view does violence to the plain language of the Act; is inconsistent with the legislative history of the Act and of the 1939 Mississippi Choctaw statute; and is inconsistent with the Interior Department's interpretation of the Act.

The courts below erroneously viewed the establishment of the Choctaw Reservation as inconsistent with the Treaty of Dancing Rabbit Creek and with citizenship of the Choctaws. The state court in an earlier decision imposed a requirement of state consent under the arsenals and dockyards clause of the Constitution, but this Court has previously rejected such a requirement in like circumstances.

The federal court below erroneously interpreted 18 U.S.C. § 1151(a) to preclude federal jurisdiction over the Choctaw Reservation because it consists of seven non-contiguous villages. This view is contrary to decisions of this Court interpreting that statute and the Major Crimes Act.

The federal court below ruled that the Mississippi Choctaws are not Indians, because they were purportedly terminated by the Treaty of Dancing Rabbit Creek. This is inconsistent with the terms of the treaty and with subsequent federal statutes and administrative treatment.

The state court below in a prior case held that Mississippi acquired jurisdiction over the Choctaws pursuant to the federal consent statute, Public Law 280, in 1972. However, that state action was insufficient to comply with that law, and the Choctaws did not consent as required by 25 U.S.C. § 1326.

This Court has consistently held that Major Crimes Act jurisdiction is exclusive of state court jurisdiction. No reason exists to apply a different rule to the Mississippi Choctaws. Concurrent state/federal jurisdiction would be troublesome and should be rejected.

In the alternative, the double jeopardy clause bars the state's reprosecution of defendant.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER NO. 77-575 AS AN APPEAL.

In its order of January 16, 1978, the Court postponed the question of jurisdiction in No. 77-575 to the hearing of the case on the merits. 46 U.S.L.W. 3453. In the discussion following, defendant supports jurisdiction over this case as an appeal.

28 U.S.C. § 1257(2) confers jurisdiction over appeals from the highest court of a state "where [there] is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the de-

cision is in favor of its validity." In the present case, Mississippi prosecuted defendant pursuant to Miss.C. Ann. § 97-3-7(2), defining and punishing aggravated assault.[45] By motion to dismiss and on appeal, defendant contended that state jurisdiction to apply this statute to him is preempted by the federal laws establishing the Choctaw Indian Reservation, defining the Reservation as Indian country, and providing for the punishment in Indian country of offenses by Indians. (These contentions are of course the subject of the remainder of this brief.) Defendant thus drew into question the validity of the Mississippi statute as applied to him on the ground that it is repugnant to the Supremacy Clause of the Constitution, art. VI, § 2, and the court below ruled in favor of the statute's validity.

The Court has held that Section 1257(2) applies to cases where the issue is the validity of a state statute as applied, as well as where the issue is validity of the statute on its face.[46] On the other hand an appeal does not lie where the claim is that there is an erroneous exercise of authority under a valid statute,[47] or that an otherwise valid statute is being applied discriminatorily in viola-

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[45] The issue is not actually confined to this statute and applies as well to the general state laws conferring jurisdiction on the trial court, authorizing arrests, authorizing indictments, etc. However, the particular assault statute is the focus of the issue, and no purpose would be served in detailing the other state laws that were applied to defendants.

[46] Bantam Books v. Sullivan, 372 U.S. 58, 61 n.3 (1963); Fiske v. Kansas, 274 U.S. 380, 385 (1927); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

[47] Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245 U.S. 162 (1917).

tion of the Constitution.[48] While the distinction between these situations may be difficult at times, the instant case is clearly within Section 1257(2). Defendant contends that Mississippi's criminal laws are invalid as applied to Indians in Choctaw Indian Country under the Supremacy Clause—a categorical claim not dependent on the particular form of application of those laws in this case.

Historically, this Court reviewed cases where federal rights accorded Indians were in conflict with state law, and a state court had ruled in favor of the state law position, by writ of error, the ancestor of today's appeal procedure.[49] Under the modern appeal procedure the Court has accepted jurisdiction on appeal in other such cases.[50] Like cases have also been reviewed on certiorari, but this was apparently based solely on the election of petitioning counsel.[51]

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[48] Charleston Fed'l Savings & Loan Assn v. Alderson, 324 U.S. 182 (1945).

[49] Sizemore v. Brady, 235 U.S. 441 (1914); Choate v. Trapp, 224 U.S. 665 (1912); Tiger v. Western Investment Co., 221 U.S. 286 (1911); McKay v. Kalyton, 204 U.S. 458 (1907); Spalding v. Chandler, 160 U.S. 394 (1896); The New York Indians, 72 U.S. (5 Wall.) 761 (1867); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (3 cases); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); *see also* New York ex rel. Cutler v. Dibble, 62 U.S. (21 How.) 366 (1859); Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1857).

[50] Antoine v. Washington, 420 U.S. 194 (1975); Tonasket v. Washington, 411 U.S. 451 (1973); McClanahan v. Arizona Tax Com'n, 411 U.S. 164 (1973); Warren Trading Post Co. v. Arizona Tax Com'n, 380 U.S. 685 (1965); Tulee v. Washington, 315 U.S. 681 (1942).

[51] *E.g.*, Williams v. Lee, 358 U.S. 217 (1959).

The other requisites of jurisdiction on appeal are clearly met. There is a final judgment of the highest court of the state; the case presents federal questions which were decided by that court; and as the discussion in the remainder of this brief makes clear, the questions are substantial. For these reasons, jurisdiction over No. 77-575 is properly grounded on 28 U.S.C. § 1257(2).

There is also jurisdiction pursuant to 28 U.S.C. § 1257(1), on the ground that the court below held several federal statutes to be invalid as applied. The federal laws in question are (1) the special Mississippi Choctaw statute of 1939, 53 Stat. 851, *supra,* and the Indian Reorganization Act, *supra,* particularly sections 7 and 19, 25 U.S.C. §§ 467 and 479; (2) the Major Crimes Act, 18 U.S.C. §§ 1153 and 3242; the Indian country statute, 18 U.S.C. § 1151; and the particular federal statute punishing assault, 18 U.S.C. § 113.

The court below found these statutes to be unconstitutional in three respects. The opinion views the statutes as in conflict with the Treaty of Dancing Rabbit Creek, 7 Stat. 333 (1830), and rules that the treaty "cannot be altered by an Act of Congress, Congress cannot obliterate the jurisdiction of Mississippi over its citizens." J.S. page 6a. Although this statement is made in one sentence, it contains two concepts: that a treaty has a higher status in federal law than a statute, and that Congress lacked authority to preempt state jurisdiction over the Choctaws because they were state citizens. The statutes' third infirmity found by the court below is based on the court's express reliance on its prior decision in *Tubby* v. *State,*

327 So.2d 272 (Miss. 1976), involving identical issues.[52] In that opinion the court below ruled that state consent is constitutionally required for federal jurisdiction over the Mississippi Choctaws, relying on the arsenals and dockyards clause of the Constitution, art. I, § 8, cl.17. 327 So.2d at 281-84.

Thus on three related grounds, the court below ruled that Congress had no power to preempt criminal jurisdiction over the Mississippi Choctaws, so that the federal laws establishing the present Choctaw Reservation and asserting criminal jurisdiction over Choctaw Indian Country are invalid as applied. Jurisdiction thus lies on appeal pursuant to 28 U.S.C. § 1257(1)

II. THE FEDERAL DISTRICT COURT HAD MAJOR CRIMES ACT JURISDICTION

A. General Law Regarding the Major Crimes Act.

Federal jurisdiction to prosecute defendant depended on the applicability of the Indian Major Crimes Act, 18 U.S.C. §§ 1153 and 3242, and of the related code section, 18 U.S.C. § 1151 (Indian country), which defines the territorial applicability of the Major Crimes Act.[53] The general principles governing application of these sections are thus the basic law for the issues now on review.

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[52] The *Tubby* ruling on these issues was technically *dictum,* because the court reversed Mr. Tubby's conviction on other grounds.

[53] 18 U.S.C. § 1151, and pertinent parts of 18 U.S.C. §§ 1153 and 3242, are printed in the Appendix to this brief. The latter sections were amended after the events here at issue, and the Appendix includes the sections in force at that time (August 30, 1975).

The Major Crimes Act was first enacted in 1885 to provide for federal prosecution of Indians accused of seven felony-grade offenses "within the boundaries of any State of the United States, and within the limits of any Indian reservation . . ." and in the territories.[54] Subsequent amendments and reenactments enlarged the list of offenses to fourteen,[55] and the area of coverage was changed in 1948 to Indian country as defined by 18 U.S.C. § 1151.

The first interpretation of the Major Crimes Act by this Court was made in *United States* v. *Kagama,* 118 U.S. 375 (1886). Two Indians were convicted of murder occurring within the Hoopa Indian Reservation in California, a reservation established by executive orders pursuant to statutory authority, all made after California had become a state.[56] Their counsel argued that the state courts had exclusive jurisdiction over

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[54] Act of Mar. 3, 1885, c.341, § 9, 23 Stat. 362, 385. This statute is the ancestor of both 18 U.S.C. § 1153 and § 3242.

[55] In chronological order, these were:

Act of Jan. 15, 1897, c.29, § 5, 29 Stat. 487;
Act of Mar. 4, 1909, c.321, § 328, 35 Stat. 1088, 1151;
Act of June 30, 1926, c.712, 44 Stat. 777, 18 U.S.C. § 548 (codified but terms unchanged);
Act of June 28, 1932, c.285, 47 Stat. 336-37;
Act of June 25, 1948, c.645, 62 Stat. 683, 758, 827, 18 U.S.C. §§ 1153, 3242;
Act of May 24, 1949, c.139, 63 Stat. 89, 94, 96;
Act of Nov. 2, 1966, Pub.L. 89-707, 80 Stat. 1100-01;
Act of Apr. 11, 1968, Pub.L. 90-284, § 501, 82 Stat. 73, 80;
Act of May 29, 1976, Pub.L. 94-297, 90 Stat. 585-86.

[56] The establishment and extension of the Hoopa Reservation are detailed in Mattz v. Arnett, 412 U.S. 481 (1973); Short v. United States, 486 F.2d 561 (Ct.Cl. 1973), *cert. denied,* 416 U.S. 961, reh. den. 417 U.S. 959; and Donnelly v. United States, 228 U.S. 243 (1913). The latter case is discussed further *infra.*

the offense, but this Court rejected the contention and affirmed the convictions. The *Kagama* ruling has never been departed from in subsequent decisions of this Court.[57]

Prior to 1948 the term "Indian country" had a somewhat separate legal history from the Major Crimes Act.[58] Indian country was the territory within which federal statutes applied defining liquor offenses,[59] inter-racial crimes,[60] trade with Indians,[61] and certain other matters.[62] For a long period there was no comprehensive statutory definition of Indian country,[63] and the federal courts thus undertook to define the term as a matter of decisional law. In *Donnelly* v. *United States,* 228 U.S. 243 (1913), the Court re-

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[57] The Court has frequently cited *Kagama* favorably, most recently in United States v. Antelope, 430 U.S. 641, 648 (1977). *See also* Antoine v. Washington, 420 U.S. 194, 199-200 (1975); United States v. Mazurie, 419 U.S. 544, 557 (1975); Keeble v. United States, 412 U.S. 205, 209 n.9 (1973); McClanahan v. Arizona Tax Com'n, 411 U.S. 164, 169 (1973); Williams v. Lee, 358 U.S. 217, 219 n.4 (1959).

[58] *See, e.g.,* United States v. Celestine, 215 U.S. 278, 285 (1909).

[59] *See* Rev. Stat. 2139, *as amended,* 18 U.S.C. § 1154; Rev. Stat. 2141, now 25 U.S.C. § 251; Act of June 30, 1919, c.4, § 1, 41 Stat. 4, now 18 U.S.C. § 1156.

[60] *See* Rev. Stat. 2145-46, *as amended,* 18 U.S.C. § 1152.

[61] *See* Rev. Stat. 2133, *as amended,* 25 U.S.C. § 264.

[62] *See generally* Rev. Stat. Title XXVIII ch. 4.

[63] From the effective date of the Revised Statutes in 1874, there was no statutory definition of any kind until 1897. The Act of Jan. 30, 1897, c.109, § 1, 29 Stat. 506, amending the basic liquor prohibition statute, specified that Indian allotments were included in the term Indian country. However, there was no general definition until the 1948 enactment of 18 U.S.C. § 1151.

viewed the federal conviction of a white man for murder of an Indian within the Hoopa Reservation (the same locale as the *Kagama* case). After a thorough review of the issue, the Court decided that the Reservation was Indian country, and the conviction was affirmed.[64] Later the same year the Court in *United States* v. *Sandoval,* 231 U.S. 28 (1913), held that the Santa Clara Pueblo in New Mexico was Indian country despite the distinctive history and form of land tenure of the Pueblos.[65] Shortly thereafter in *United States* v. *Pelican,* 232 U.S. 442 (1914), the Court held that a single Indian trust allotment was Indian country.[66] In *United States* v. *McGowan,* 302 U.S. 535 (1938), the issue was whether land purchased by the United States in 1916 and 1926 for residence of needy Indians in Nevada and commonly termed an "Indian colony" was Indian country, and the Court ruled that it was.

When Congress codified the term Indian country in 1948 as 18 U.S.C. § 1151, it directly relied on those decisions of the Court. Section 1151(a), Indian reservations, comes from both the prior language of the Major Crimes Act and from the Court's decision in *Donnelly* v. *United States, supra. See* Reviser's Note, 18 U.S.C.A. § 1151. Section 1151(c), Indian allotments, codified the Court's decision in *United States* v. *Peli-*

[64] The Court held or assumed other Indian reservations to be Indian country in Pronovost v. United States, 232 U.S. 487 (1914), and Williams v. United States, 327 U.S. 711 (1946).

[65] *Sandoval* was followed in United States v. Chavez, 290 U.S. 357 (1933), involving the Isleta Pueblo.

[66] *Pelican* involved a trust allotment. In United States v. Ramsey, 271 U.S. 467 (1926), the Court held that a restricted allotment was also Indian country.

can, supra. Id. Section 1151(b), dependent Indian communities, codified a term the Court had used in the opinions in *United States* v. *Sandoval* and *United States* v. *McGowan, supra,* to refer to Indians living on trust or restricted lands described by some term other than "reservation" or allotment." *Id.* Furthermore Section 1151(b) expressly applies everywhere "within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state." [67]

The intent of Congres in enacting Section 1151, as illustrated by the prior decisions of this Court, was thus to define Indian country as any land or area lawfully reserved or set aside for the residence of Indians under federal supervision. Distinctions according to whether the land was set aside by treaty, statute, executive order, purchase or otherwise, were disapproved, as were distinctions based on the common label applied to the lands [68] or on whether the reservations were created before or after statehood.

[67] The quoted language was codified almost *verbatim* out of the Court's opinion in United States v. Sandoval, *supra,* 231 U.S. at 46, quoted with approval in United States v. McGowan, *supra,* 302 U.S. at 538.

[68] *See* in particular the discussion in United States v. McGowan, *supra,* 302 U.S. at 538-39. In other contexts, the Court has reached similar conclusions. For example in Minnesota v. Hitchcock, 185 U.S. 373, 389-90 (1902), the Court stated:

> Now, in order to create a reservation, it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

See also Spalding v. Chandler, 160 U.S. 394, 403-04 (1896); Arizona v. Calif., 373 U.S. 546, 597-98 (1963).

Neither opinion below evidences any disagreement with the general law regarding the Major Crimes Act or Indian country. Instead both opinions seek to carve out a unique exception for the Mississippi Choctaws. However, it is apparent that such a view finds support in neither the terms of the statutes nor the prior decisions of this Court. The plain language of both the original Major Crimes Act and of the 1948 Code provisions now in force is inclusive of all states and of all Indians. This Court has consistently rejected prior attempts to except particular Indian lands from the reach of the statutes.[69] Also, Congress has enacted specific exceptions to the basic statutes, manifestly on the assumption that absent such exceptions the statutes would apply.[70]

B. The Choctaw Reservation Is Indian Country.

Major Crimes Act jurisdiction applies only to events in Indian country, and the principal basis for both decisions below is their conclusion that the Choctaw Reservation is not Indian country or that Congress had no authority to establish Indian country in Mississippi. These conclusions are incorrect.

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[69] United States v. McGowan, *supra;* United States v. Chavez, *supra;* United States v. Ramsey, *supra;* Pronovost v. United States, *supra;* United States v. Pelican, *supra;* United States v. Sandoval, *supra;* Donnelly v. United States, *supra;* United States v. Celestine, *supra.* Of course the Court has recognized that the Indian country status of lands can be lawfully terminated by Congress, *e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975).

[70] *See* 25 U.S.C. § 232 (New York State reservations) and Public Law 280, 18 U.S.C. § 1162, *as amended*, 25 U.S.C. § 1321. 18 U.S.C. § 1162(c) makes specific reference to the Major Crimes Act, 18 U.S.C. § 1153.

The reestablishment of federal supervision over the affairs of the Mississippi Choctaws has proceeded in several stages. The policy of the Treaty of Dancing Rabbit Creek favoring removal of the Choctaws to Indian Territory remained federal policy into this Century. As recited above, the decisions of the Dawes Commission and Congress induced the removal of a number of Mississippi Choctaws to Indian Territory as late of 1906. At that time the federal policy was not to assist the Choctaws in Mississippi unless they would remove. But the Government had a change of heart, and in 1918 Congress appropriated funds to establish an Indian Agency at Philadelphia, Mississippi, and to assist the Choctaws to buy land of their own. In 1935, the Bureau of Indian Affairs submitted the Indian Reorganization Act to the Mississippi Choctaws for approval or rejection,[71] recognizing them as a separate group from the Oklahoma Choctaws. They voted to accept the Act, and additional land purchases were made for them pursuant to Section 5, 25 U.S.C. § 465.

In 1939 Congress specifically acted to place title to the lands held for the Mississippi Choctaws in trust for the benefit of the Mississippi Choctaws of one-half or more Indian blood. 53 Stat. 851, *supra.* This statute was clearly tied to the Indian Reorganization Act in several respects. The one-half blood definition is taken from Section 19 (25 U.S.C. § 479). The legislative history clearly indicates that Congress intended by the statute to qualify the Choctaws for self-government under the I.R.A. See discussion below at pages 30-31. In 1944 the Secretary of the Interior proclaimed

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[71] *See* n.30 *supra.*

the Choctaw lands to be an Indian reservation pursuant to 25 U.S.C. § 467. 9 Fed. Reg. 14907 (1944), Pet. pp. 23A-33A."

These events were clearly sufficient to include the Choctaw Reservation within the Major Crimes Act jurisdiction. In 1944 that jurisdiction applied only within Indian reservations, as noted above, although this Court's definition of "Indian country" was broader. In 1948 Congress defined Indian country and utilized the term in the Major Crimes Act. Thus the Choctaw Reservation came within the Major Crimes Act as of 1944, when it was proclaimed an Indian reservation by the Secretary. That conclusion was strengthened when Congress codified Indian country in 1948, essentially adopting the views of this Court in *United States* v. *McGowan,* 302 U.S. 535 (1938). Under *McGowan,* the 1939 Choctaw statute was sufficient to constitute the Choctaw lands as a "dependent Indian community" and thus Indian country. For this reason the present Choctaw Reservation is Indian country under 18 U.S.C. § 1151(a) (Indian reservations) and 18 U.S.C. § 1151(b) (dependent Indian communities).

Both decisions below reject the reasoning just stated on two grounds. First, they construe the Indian Reorganization Act as inapplicable, thus invalidating the 1944 proclamation of the Secretary. Second, they find the process to be beyond the constitutional authority of Congress for various reasons. The federal decision

[12] Current Government publications list the Choctaw Reservation as a federal Indian reservation, *e.g.,* U.S. Dept. of Commerce, Federal and State Indian Reservations and Indian Trust Areas (GPO 1974) p. 265.

adds a third ground: that the 1948 act defining Indian country (18 U.S.C. § 1151) excluded the Choctaw Reservation irrespective of other considerations. Each of these contentions should be considered separately.

(1) The Indian Reorganization Act Applies to the Mississippi Choctaws.

Both opinions below construe the I.R.A. to apply only to recognized tribes living on reservations in existence at the time the Act was passed. J.S. pp. 7a-8a; Pet. pp. 19A-20A. This construction is incorrect for a number of reasons.

First, it does violence to the plain language of the Act. Section 19 (25 U.S.C. § 479) defines Indians as members of tribes, their descendants living on reservations in 1934, "and shall further include all other persons of one-half or more Indian blood." The construction below would confine the Act solely to tribal members and descendants and thus nullify the quoted language. For these and other reasons, the District of Columbia Circuit reached a contrary result in *Maynor* v. *Morton,* 510 F.2d 1254 (D.C. Cir. 1975).

The interpretation of the Act below would nullify Section 7 of the I.R.A. (25 U.S.C. § 467), authorizing the Secretary to "proclaim new Indian reservations." If the I.R.A. is fully confined to reservations existing in 1934, this authority is meaningless." The point becomes clearer when Section 7 is read together with Section 5 (25 U.S.C. § 465). The latter author-

[13] 25 U.S.C. Section 473 provides that portions of the I.R.A. (including section 7) do not apply to certain tribes in Oklahoma, including the Choctaws. However, the exception is confined to that state. See, 78 Cong. Rec. 11126 (1934). Also, the specifying of some exceptions implies an intent to be otherwise inclusive.

izes acquisition of lands "within or without existing reservations" in trust for either Indian tribes or individual Indians. The process obviously contemplated purchases in trust pursuant to Section 5 followed in some cases by proclamations under Section 7, and this is in part what occurred regarding the Choctaw Reservation. However, Congress also interposed the special 1939 Act in order to bring the Choctaw lands acquired between 1918-1931 within the I.R.A. as well, a purpose made clear by the legislative history of that act (see below).

That Congress did not exclude the Mississippi Choctaws from the benefits of the I.R.A. is also clear from the legislative history of both the I.R.A. and of the 1939 Act. While there can be little if any ambiguity in the terms of the relevant sections of the I.R.A. the legislative history reinforces the obvious. In the House bill, Section 7 would have permitted only additions to existing reservations."[74] But the conference committee adopted the Senate's version, which is the present law."[75] It authorized the Secretary to "proclaim new Indian reservations" as well as to add lands to existing reservations. The history also makes clear that a major purpose of Section 5 was to acquire land for "landless Indians."[76]

The 1939 Choctaw statute was passed at the request of the Interior Department, and its purposes were stated in the House Report:

> *Specific effect of the bill if enacted*—It will place all those lands purchased under the authority of the

[74] H.Rept. No. 1804, 73d Cong., 2d Sess. (1934) p. 3.

[75] H.Rept. No. 2049 (Conference Report), 73d Cong., 2d Sess. (1934), pp. 3, 7.

[76] H.Rept. No. 1804, 73d Cong., 2d Sess. (1934), p. 7; S.Rept. No. 1080, 73d Cong., 2d Sess. (1934), p. 2.

> various resale acts in the same status as the lands being purchased under the authority of section 5 of the Indian Reorganization Act for the Mississippi Choctaws.
>
> *Advantages*—It will avoid many administrative problems which will arise otherwise; will insure a more productive use of the lands; and will facilitate matters greatly if the Indians should choose to organize under section 16 of the Indian Reorganization Act, and take over administration of their lands."

Thus Congress in 1939, only five years after the I.R.A. expressly recognized that the Mississippi Choctaws are within that Act. In particular Congress recognized that the Mississippi Choctaws are eligible for reservation self-government pursuant to Section 16 (25 U.S.C. § 476).

A further problem with the statutory construction of the decisions below is that it runs contrary to the interpretation of the relevant laws by the Interior Department and Bureau of Indian Affairs, to whose administration these statutes are committed. This Court has frequently held that administrative interpretations in such circumstances are entitled to deference. *E.g., Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 660 (1976). Soon after the I.R.A. was enacted, the Bureau of Indian Affairs conducted elections among the Indians to whom it applied. The elections were mandated by Section 18 (25 U.S.C. § 478), requiring that the Indians vote on whether to accept or reject the statute. In 1935 an election was held among the Mississippi Choctaws, and they voted to accept the Act."[78] This

[77] H.Rept. No. 194, 76th Cong., 1st Sess. (1939), p. 3.

[78] *See* n.30, *supra*.

was a recognition by the B.I.A. of the Mississippi Choctaws as an Indian band to whom the Act applied.

The administrative interpretation of the I.R.A. was temporarily placed in doubt between May 1936 and January 1938 by the litigation resulting in this Court's decision in *United States* v. *McGowan,* 302 U.S. 535 (Jan. 1938). Both lower courts in that case had held that Indian country could not be reestablished by federal purchase of lands for Indians."[9] The Interior Department was aware of these decisions, *e.g.,* 56 I.D. 137, 143 (1937). But this Court's decision in *McGowan* reversing the lower courts removed those doubts.

Soon thereafter the Department proposed to Congress the enactment of the 1939 Choctaw statute, to convert the lands acquired for the Choctaws between 1918-1931 into trust lands held for all the Choctaws as defined in Section 19 of the I.R.A. and equate those lands with others acquired for the Choctaws pursuant to Section 5 of the I.R.A. As noted above, one purpose of the 1939 Act was to enable the Choctaws to organize a tribal government under Section 16 of the I.R.A.

In 1944 the Secretary exercised his authority pursuant to Section 7 of the I.R.A. to "proclaim" the Choctaw Reservation, and in 1945 he approved a tribal constitution for the Mississippi Band of Choctaw Indians.

The process followed in these steps had been outlined in a 1935 opinion of Assistant Interior Solicitor Felix Cohen, printed as Appendix F to the United States' Petition for Certiorari.

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[9] United States v. One Chevrolet Automobile, 16 F.Supp. 453 (D. Nev. May 1936), *aff'd. sub nom.* United States v. McGowan, 89 F.2d 201 (9th Cir. Mar. 1937), *reversed,* 302 U.S. 535 (Jan. 1938).

Also, the Government has for many years provided services to the Mississippi Choctaws comparable to those provided other Indians under federal supervision. For example, virtually all Choctaw children are educated in federal Indian schools. Note 43, *supra.*

Therefore, the Interior Department and Congress began to restore federal supervision over the Mississippi Choctaw in 1918, and the process culminated in 1944-45. These actions were taken based on the view of both branches that the Indian Reorganization Act applied to the Mississippi Choctaws. There is no basis in law or fact for the courts to overturn this interpretation, and the contrary rulings below are erroneous.

(2) The Relevant Acts of Congress Are Valid as Applied to the Choctaws.

The state decision below appears to rule that Congress lacked authority to establish the Choctaw Reservation and/or to apply the Major Crimes Act to defendant. The opinion holds: (1) These activities conflict with the Treaty of Dancing Rabbit Creek, "and it cannot be altered by an Act of Congress" (J.S. page 6a); (2) "Congress cannot obliterate the jurisdiction of Mississippi over its citizens." Id. In addition the opinion relies expressly on that court's prior decision in *Tubby* v. *State,* 327 So.2d 272 (Miss. 1976), which held that the Constitution precludes application of the Major Crimes Act to Mississippi Choctaws without state consent pursuant to the arensals and dockyards clause, art. I, § 8, cl. 17. 327 So.2d at 281-84.

The federal decision below purports to reserve the constitutional questions, but a prior decision of that court reached the same conclusions as the state court;

indeed the state court below quoted its holding from the earlier federal decision.[80]

It is of course clear that Congress can overrule, repeal, or limit an Indian treaty and has often done so.[81] The federal opinion below recognizes this and shifts the argument to the doctrine of repeal by implication. Pet. pages 18A-19A. However, this argument is flawed in several respects. First, as noted above (at page 10), the Treaty of Dancing Rabbit Creek was largely superseded in 1855. Second, the repeal aside, a problem with the view of both lower courts is their assumption that the Indian Reorganization Act, the 1939 Choctaw lands statute, and the Major Crimes Act are in conflict with the treaty. No treaty provision addresses criminal jurisdiction over the Choctaws, nor does any provision purport to restrain the United States from reestablishing federal supervision over Indians in Mississippi. The treaty provided for the cession of Choctaw lands in Mississippi to the United States, and the policy of the treaty was to induce removal to Indian Territory. Indians remaining in Mississippi (as permitted by the treaty) were not within Indian country, so that the special federal laws applicable thereto did not apply

[80] J.S. pp. 6a-8a, quoting from the second opinion in United States v. Mississippi Tax Com'n, 505 F.2d 633 (5th Cir. 1974), *rehearing denied*, 535 F.2d 300 (1976), *rehearing en banc denied*, 541 F.2d 469 (1976).

[81] *E.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587-88 (1977); Lone Wolf v. Hitchcock, 187 U.S. 553, 555-56 (1903); *but see*, Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977), where the Court indicated that Congress' power must be rationally tied to the United States' unique obligation to the Indians. However, that standard is consistent with restoration of federal protection over the Choctaws in Mississippi.

to them, and most state laws did.[82] But that tacit result did not depend on any affirmative provision of the treaty.

Also, the matter is entirely within the province of Congress and the Executive Department, as expressly recognized in this Court's opinion in *Winton* v. *Amos*, 255 U.S. 373 (1921), a decision relied on by the federal court below. In that case, the Choctaw Nation (in Oklahoma) argued that Congress could not charge its treaty-granted property with the claim there at issue, but the Court rejected the argument, stating:

> It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property.

255 U.S. at 391-92.

The second argument against the power of Congress apparently focuses on the claim that the Choctaws were made citizens of Mississippi by state statute and constitution at the time of the Treaty of Dancing Rabbit Creek. J.S. page 6a; Pet. page 10A. Whether these acts made the Mississippi Choctaws citizens or not is debatable,[83] and the Choctaws were denied the political

[82] *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-50 (1973).

[83] The treaty did not directly confer citizenship on the Choctaws. Article 14 states that Choctaws "desirous" of becoming citizens could remain and receive land. In United States v. Boyd, 83 F. 547 (4th Cir. 1897), similar language in another treaty was construed only to permit the Indians to apply to the United States for naturalization. In United States v. Sandoval, 231 U.S. 28, 48 (1913), this Court expressly reserved a similar question. As for the state laws, citizenship is essentially a national matter over which the state have

rights of citizens until the 1960s.[84] Defendant concedes that he and other Choctaws have been legally citizens at least since 1924.[85] In either case, this Court has specifically held that citizenship of an Indian is irrelevant to application of the Major Crimes Act. In *Apapas* v. *United States,* 233 U.S. 587 (1914), defendant argued that he had been made a citizen by treaty. In *United States* v. *Celestine,* 215 U.S. 278 (1909), defendant was a citizen by statute. But in both cases the Court sustained Major Crimes Act jurisdiction notwithstanding. The Court has also held citizenship not incompatible with federal supervision over Indians in a variety of other contexts.[86] Furthermore, the view of the courts below would invalidate the Major Crimes Act entirely, because all Indians have been citizens at least since 1924.[87]

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little authority. Of course the states could confer broad state law rights on Indians irrespective of their national status as citizens. *Cf.*, The Kansas Indians, 72 U.S. (5 Wall.) 737, 744 (1867). Mississippi purported to do that *de jure,* but in fact denied the Choctaws most rights until recently.

[84] As noted in the Statement of the Case, the purpose of the 1829-30 Mississippi laws purporting to apply state laws to the Choctaws was to force their removal. As to the actual denial of the rights and benefits of citizenship, *see* note 41, *supra.*

[85] The Act of June 2, 1924, c.233, 43 Stat. 253, *as amended,* 8 U.S.C. § 1401(a)(2), conferred U.S. citizenship on all U.S.-born Indians not previously made citizens by other laws.

[86] *E.g.,* McClanahan v. Arizona Tax Com'n, 411 U.S. 164, 172-73 (1973); Creek County v. Seber, 318 U.S. 705, 718 (1943); United States v. Nice, 241 U.S. 591, 598 (1916); Bowling v. United States, 233 U.S. 528 (1914); United States v. Sandoval, 231 U.S. 28, 48 (1913); Hallowell v. United States, 221 U.S. 317, 324 (1911); Tiger v. Western Investment Co., 221 U.S. 286, 310-13 (1911); United States v. Rickert, 188 U.S. 432, 445 (1903).

[87] Note 85, *supra.*

The third contention of invalidity of the statutes as applied is that the consent of the state is required for federal jurisdiction over the Choctaws, relying on the arsenals and dockyards clause, Const., art. I, § 8, cl. 17. However, the authority of Congress over Indian affairs does not arise from that clause, but rather from the commerce clause and treaty power[88] and from the property clause.[89] In *United States* v. *McGowan,* 89 F.2d 201, 202 (9th Cir. 1937), the court held that application of an Indian country statute was precluded by the arsenals and dockyards clause, but this Court unanimously reversed, 302 U.S. 535 (1938). The Court also rejected a state consent argument in *Antoine* v. *Washington,* 420 U.S. 194, 200-05 (1975).[90]

The foregoing arguments can perhaps be summarized under a general claim that the federal government lacks authority to preempt jurisdiction over Indians within a state after statehood. However, this argument has been rejected by this Court in a number of contexts.[91]

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[88] McClanahan v. Arizona Tax Com'n, 411 U.S. 164, 172 n.7 (1973).

[89] Arizona v. California, 373 U.S. 546, 597-98 (1963); United States v. McGowan, 302 U.S. 535, 539 n.12 (1938); United States v. Celestine, 215 U.S. 278, 284 (1909).

[90] *See also,* L. Davis, Jurisdiction over Indian Country, 1 Ariz.L. Rev. 62, 65 (1959): ". . . [I]t is well established that no cession of jurisdiction by the state legislature, such as is required to establish exclusive federal jurisdiction over enclaves reserved for forts, magazines, arsenals, dock-yards and other needful buildings, is necessary to enable Congress to assume exclusive jurisdiction over Indians."

[91] Antoine v. Washington, 420 U.S. 194, 200-05 (1975); Arizona v. California, 373 U.S. 546, 597-98 (1963); Creek County v. Seber, 318 U.S. 705, 715-19 (1943); United States v. McGowan, 302 U.S. 535 (1938); Donnelly v. United States, 228 U.S. 243 (1913); United States v. Kagama, 118 U.S. 375 (1886).

For these reasons, there is no constitutional impediment to the application of the Major Crimes Act to defendant.

(3) The Choctaw Reservation is Included Within the Terms of 18 U.S.C. § 1151.

The federal opinion below holds that it was one purpose of 18 U.S.C. § 1151 to avoid "checkerboarding" of Indian country jurisdiction, citing this Court's decision in *Seymour* v. *Superintendent,* 368 U.S. 351 (1962). The opinion points out that the Choctaw Reservation includes a number of Choctaw communities separated from one another, and that noncontiguous tracts of land are involved. However, this reasoning misapplies the law.

As the Statement of the Case above indicates, the reservation does consist of seven noncontiguous Choctaw villages in several Mississippi counties. These have long been Choctaw settlements, and the federal land acquisition program of this century acquired trust lands where the Choctaws were already concentrated. Since the 1944 proclamation of the Secretary discussed in the federal opinion, the tribe and the B.I.A. have engaged in land consolidation at the seven sites, but these sites remain removed from one another. Nevertheless, *Seymour* v. *Superintendent, supra* does not support the decisions below in these cases.

In *Seymour* v. *Superintendent,* this Court was construing the phrase in 18 U.S.C. § 1151(a) including within Indian country all lands within "opened" Indian reservations "notwithstanding the issuance of any patent." This phrase codified certain decisions of the Court interpreting the Major Crimes Act, where the

Court had held that patented lands within reservations were included within the jurisdiction conferred by the Act.[92] The Court in *Seymour* noted that this had the effect of reducing the difficulties posed by "checkerboarding" of those reservation areas allotted and opened to non-Indian settlement. 368 U.S. at 357-58. Contrary to the federal opinion below (Pet. pages 5A-7A), the Court did not there determine that Congress specifically intended to avoid "checkerboarding," only that the Act had that effect. But even if Congress had so intended, that phrase in 18 U.S.C. § 1151(a) has no application to the instant case. There is no issue here regarding the boundaries of the Choctaw Reservation, nor is any fee land within a reservation at issue. The events in this case occurred on land held in trust by the United States for the Mississippi Choctaw Indians and proclaimed to be an Indian reservation in 1944.[93] As outlined earlier, the 1944 proclama-

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[92] United States v. Celestine, 215 U.S. 278 (1909); United States v. Thomas, 151 U.S. 577 (1894) (alternate holding). However, the Court's decisions on whether fee lands within reservations were "Indian country"—a term then not part of the Major Crimes Act—had created some uncertainty. Compare United States v. Soldana, 246 U.S. 530 (1918) with Clairmont v. United States, 225 U.S. 551 (1912). This uncertainty was eliminated by enactment of 18 U.S.C. § 1151(a).

[93] The situation of the Choctaw Reservation does not present the same practical problems as that recited in the opinion in Seymour v. Superintendent, *supra*. In *Seymour*, much of the land within the reservation was individually owned either by allotted Indians or by non-Indians and subject to individual sale. Thus if Indian country changed with ownership, it could change upon an individual transaction. By contrast the Choctaw Reservation lands are all held in tribal trust by the United States. Thus the Choctaw boundaries may be irregular but are not subject to the vicissitudes of individual sale. This greater permanence reduces practical difficulties.

tion brought the Reservation within the pre-1948 Major Crimes Act. There is certainly no basis whatsoever for interpreting the 1948 Act to remove any Indian reservation from the Major Crimes Act.

The 1948 Act did not eliminate "checkerboarding," it only removed one particular source of it, that is, the allotment and opening of some Indian reservations. Reservations such as Choctaw which were created as non-contiguous villages were not to be destroyed. More importantly, 18 U.S.C. § 1151(c), defining all trust or restricted Indian allotments as Indian country, obviously has the effect of preserving non-contiguous areas of Indian country. In so doing Congress only codified prior decisions of this Court.[94] The Court has since expressly recognized that some statutes and agreements terminated or reduced Indian reservations, leaving only non-contiguous trust allotments as Indian country.[95]

18 U.S.C. § 1151(b), designating "dependent Indian communities" as Indian country, also demonstrates the error of the federal decision below. As noted above, that statute codified this Court's decision in *United States* v. *McGowan,* 302 U.S. 535 (1938), holding that land purchased and taken in trust for the residence of Nevada Indians became Indian country. In *United States* v. *Martine,* 442 F.2d 1022 (10th Cir. 1971), the court held that a Navajo community

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[94] United States v. Ramsey, 271 U.S. 467 (1926); United States v. Pelican, 232 U.S. 442 (1914). In the latter case the Court expressly rejected a "checkerboarding" argument much like that in the federal opinion below. 232 U.S. at 449-50.

[95] DeCoteau v. District County Court, 420 U.S. 425, 427-28 and n.2 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

outside the Navajo Reservation proper but almost entirely Navajo, on trust lands, and under federal supervision, is a dependent Indian community within the meaning of Section 1151(b).

The enactment of 18 U.S.C. § 1151 was not intended to alter prior law in any way relevant to this case, and the conclusion of the federal decision below that the statute excluded the Choctaw Reservation is erroneous.

C. Defendant Is An Indian.

Major Crimes Act jurisdiction also requires that defendant be an Indian within the meaning of that designation in federal law. As already noted, the opinions below incorrectly rely on the citizenship of the Indians to remove the Choctaws from the Major Crimes Act (see above pp. 35-36). The state decision below otherwise accepts that defendant is Indian, but the federal opinion does not.

The facts are not in dispute. Defendant is of full Choctaw Indian ancestry and is enrolled at the Choctaw Agency of the Bureau of Indian Affairs, Philadelphia, Mississippi. While the Treaty of Dancing Rabbit Creek sought to induce the removal of as many Choctaws as possible, Article 14 allowed Choctaws to remain in Mississippi and stipulated that they should "not lose the privilege of a Choctaw citizen." Federal policy between 1830-1906 favored their removal, but they were repeatedly referred to as Indians in various statutes,[96] and those willing to go to Indian Territory

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[96] *See* Statutes cited *supra* in n.21; *see also* 5 Stat. 180 (1837); 5 Stat. 211 (1838); 5 Stat. 513 (1842); 9 Stat. 33-34 (1846); 9

were able to share in most tribal rights.[97]

As already detailed, Congress and the Interior Department fully restored federal supervision between 1908-1944. Numerous statutes of this period refer to the Mississippi Choctaws specifically as Indians,[98] and the Interior Department has manifestly treated them as such.

Despite these facts, the federal opinion below rules that the Choctaws are "terminated" from federal supervision and thus not Indians within the meaning of the Major Crimes Act. Pet. pages 8A-12A. The court relies on footnote 7 to this Court's recent opinion in *United States* v. *Antelope,* 430 U.S. 641, 646-7 (1977). The reference there is to a Klamath Indian expressly terminated by a specific federal statute, 25 U.S.C. § 564-564x. Section 564q states that:

> [A]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

No such provision of law has ever been applied to the Choctaws. As already noted, the Treaty of Dancing Rabbit Creek ceded existing tribal lands in Mississippi and thus indirectly applied state laws to any Indians

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Stat. 114 (1846); 9 Stat. 145 (1847); 9 Stat. 555-56 (1850); 9 Stat. 572 (1851); 9 Stat. 587 (1851) ("Indians in the old States"); 10 Stat. 15 (1852); 10 Stat. 41-42 (1852); 10 Stat. 226 (1853).

[97] *See* the discussion in Choctaw Nation v. U.S., 81 Ct.Cl. 1 (1935).

[98] *See* particularly the 1939 Choctaw statute, 53 Stat. 851, *supra.* See also the discussion *supra* in the Statement of the Case, page 11.

(Choctaw or other) who happened thereafter to be in the state, until Indian trust lands were reestablished. But the termination laws such as 25 U.S.C. § 564q quoted above eliminate Indian status everywhere throughout the United States for those affected.[99] Yet even after 1830, Mississippi Choctaws could receive full federal Indian services and protection by going to Indian Territory or other Indian country. They have never been treated as terminated.

Furthermore Congress has exercised the prerogative of restoring Indian status to at least one tribe which had been formally terminated. 25 U.S.C. §§ 903-03f, repealing 25 U.S.C. §§ 899-902.[100]

For these reasons, defendant is not "terminated".

Both opinions below also rely to some extent on their conclusion that the Mississippi Band of Choctaw Indians is not an Indian tribe, or is not a separate tribe from the Oklahoma Choctaws. This is not relevant to application of the Major Crimes Act, which requires only that defendant be Indian. But the conclusion is also incorrect.

The Interior Department began to deal with the Mississippi Choctaws as a separate political body at least by 1935, when it conducted an election among them on

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[99] *See, e.g.,* United States v. Heath, 509 F.2d 16 (9th Cir. 1974). As the quoted statute makes clear, "terminated" Indians may not receive federal services available to Indians. Thus the view of the federal court below that the Choctaws could be terminated but continue to receive federal services is erroneous. Pet. pp. 20A-22A.

[100] This Court's interpretation of the latter statute in Menominee Tribe v. United States, 391 U.S. 404 (1968), stands for the rule that even explicit termination statutes are strictly construed in favor of Indian rights.

whether to accept or reject the Indian Reorganization Act. See footnote 30 above and text. In 1945 the Secretary approved the Mississippi Band's constitution pursuant to Section 16 of the IRA.[101] As discussed above, these actions were authorized by Congress. See pages 30-32.

This Court has long followed the rule that recognition of Indian tribes is a matter committed to the Legislative and Executive Branches. In *United States* v. *Holliday,* 70 U.S. (3 Wall.) 407, 419 (1866), the Court stated:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

This rule has consistently been followed in subsequent cases.[102] In *United States* v. *Sandoval,* 231 U.S. 28, 46 (1913), the Court stated that the standard of judicial review in such cases is whether the decision is "arbitrary" and "manifestly unauthorized." By the standards of that decision, the Mississippi Choctaws have been properly recognized.

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[101] Current official publications list the Mississippi Band of Choctaw Indians as a federally recognized tribal group. *E.g.,* U.S. Department of the Interior, Bureau of Indian Affairs, American Indians and Their Federal Relationship (GPO 1972) p. 19; U.S. Dept. of Commerce, Federal and State Indian Reservations and Indian Trust Areas (GPO 1974) p. 265.

[102] *See* United States v. Forty-three Gallons of Whisky (Lariviere), 93 U.S. 188, 195 (1876); United States v. Candelaria, 271 U.S. 432 (1926); Baker v. Carr, 369 U.S. 186, 215-17 (1962); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-89 (1977).

The courts below disregarded this rule by giving no weight to the actions of Congress and the Interior Department. This error was apparently also influenced by according undue weight to the Treaty of Dancing Rabbit Creek.[103]

Many Indian tribes have been dealt with by the Government in separate groups, bands, or sub-tribes, according to the situation, and no court prior to the decisions concerning the Mississippi Choctaws has ever questioned the practice. Numerous treaties and laws treat with or apply to distinct groups of such well known tribes as the Sioux, Chippewa, and Apache. *See generally C. Kappler, Indian Affairs, Laws & Treaties* (GPO 1904-41). Organized tribes and bands recognized today include 16 groups of Sioux, 13 groups of Chippewa, and 10 groups of Apache, each residing on separate reservations.[104] No reason has been suggested why a different rule should be applied to the Choctaws.

Therefore no doubt can exist that defendant is properly treated as an Indian under federal law, including the Major Crimes Act.

D. Mississippi Has Not Acquired Jurisdiction Pursuant to Public Law 280.

Public Law 280 authorizes a state to acquire jurisdiction over Indian country therein and prescribes the

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[103] J.S. p. 6a; 535 F.2d at 302; both discussed *supra* at n.81 and text.

[104] *See* U.S. Dept. of Commerce, Federal and State Indian Reservations and Indian Trust Areas (GPO 1974) pp. 245, 253, 255, 259, 279, 291, 430, 433, 489, 492, 494, 496, 498, 500, 502, 505 (Sioux); pp. 227, 232, 234, 237, 240, 243, 247, 250, 257, 261, 285, 435, 579, 582, 584, 587, 593, 595 (Chippewa); pp. 39, 46, 49, 69, 72, 356, 362, 456, 462 (Apache).

method for doing so.[105] Where the criminal portion of that Act is applicable, Major Crimes Act jurisdiction is supplanted by state court jurisdiction.[106] The state court below in its prior decision in *Tubby* v. *State,* 327 So.2d 272, 285-88 (Miss. 1976), held that the 1972 amendment to the Mississippi Constitution which removed from it a possible impediment to Indians voting[107] constituted compliance with Public Law 280. This is clearly incorrect. Not only was that amendment not directed to Indian country or to court jurisdiction (the subjects of Public Law 280), but the law since 1968 has required Indian consent by referendum, and the Choctaws have not consented. 25 U.S.C. § 1326. This court has held that Public Law 280 requires strict compliance for a state to acquire jurisdiction. *Kennerly* v. *District Court,* 400 U.S. 423 (1971).[108]

Neither Public Law 280 nor any other federal law confers state jurisdiction over the Choctaw Reservation.

III. THE STATE DISTRICT COURT LACKED JURISDICTION.

A. The General Rule.

This Court has long held that federal jurisdiction pursuant to the Indian Major Crimes Act is exclusive of state jurisdiction. In its first interpretation of the

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[105] Act of Aug. 15, 1953, c.505, 67 Stat. 588, codified in part as 18 U.S.C. § 1162, 28 U.S.C. § 1360; amended, 25 U.S.C. §§ 1321-26. *See, e.g.,* Kennerly v. District Court, 400 U.S. 423 (1971).

[106] 18 U.S.C. § 1162(c).

[107] *See* note 40 above and text.

[108] As noted above at n.37 and text, the Mississippi Legislature in 1829 passed a statute purporting to apply state law to the Choctaws, but it was repealed in 1857.

Act, *United States* v. *Kagama,* 118 U.S. 375, 384-85 (1886), the Court sustained federal jurisdiction and indicated that there was no state court jurisdiction. Subsequent decisions have granted habeas corpus from state custody. *Seymour* v. *Superintendent,* 368 U.S. 351 (1962); *Rice* v. *Olson,* 324 U.S. 786 (1945). The lower federal courts have adhered to the same rule.[109]

As the *Kagama* opinion indicates, the states lack jurisdiction over reservation Indians exercising tribal self-government even in the absence of the express federal statutory jurisdiction.[110] The tribal courts have exclusive authority over most minor crimes.[111] Neither opinion below disagrees, as both are grounded expressly on the lack of federal jurisdiction. In fact the state opinion acknowledges that "[b]oth courts could not have jurisdiction. . . ." J. S. page 4a.

For these reasons state court jurisdiction to prosecute defendant is preempted both by Choctaw status as a self-governing tribe under the Indian Reorganization Act, and by the Major Crimes Act and related federal laws.

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[109] Youngbear v. Brewer, 415 F.Supp. 807 (N.D.Iowa 1976), *aff'd,* 549 F.2d 74 (8th Cir. 1977); In re Carmen's Petition, 165 F.Supp. 942 (N.D.Calif. 1958), *aff'd sub. nom.* Dickson v. Carmen, 270 F.2d 809 (9th Cir. 1959), *cert. denied,* 361 U.S. 934; Ex parte Konaha, 43 F.Supp. 747 (E.D.Wis 1942), *aff'd,* 131 F.2d 737 (7th Cir. 1942); Ex parte Pero, 99 F.2d 28 (7th Cir. 1938), *cert. denied,* 306 U.S. 643; Ex parte Van Moore, 221 F. 954 (D.S.Dak. 1915).

[110] *See also* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Fisher v. District Court, 424 U.S. 382 (1976); McClanahan v. Arizona Tax Com'n, 411 U.S. 164 (1973).

[111] *See* Keeble v. United States, 412 U.S. 205, 209-10, 214 (1973); 25 C.F.R. part 11; T. Vollmann, Criminal Jurisdiction in Indian Country, 22 Kans.L.Rev. 387, 390 (1974).

The only case with any language possibly deviating from this rule is *United States* v. *Hornbuckle,* 422 F.2d 391 (4th Cir. 1970), affirming the federal conviction of a Cherokee under the Major Crimes Act for felony assault occurring within the reservation of the Eastern Cherokees. But the court states in *dictum* that "the United States and North Carolina exercise concurrent criminal jurisdiction over the reservation."

Hornbuckle is of course squarely at odds with both decisions below in its interpretation of the Major Crimes Act, since it holds the Cherokee Reservation to be Indian country and within the Major Crimes Act, and it recognizes the Cherokees as Indians within the Major Crimes Act meaning of the term.[112] However, the *dictum* about concurrent jurisdiction requires further examination.

It must first be recognized that "concurrent" can have different meanings when applied to the Indian country. In one sense of the word all Indian country jurisdiction is concurrent among federal, state and tribal authority. It is well established that states have criminal[113] and civil[114] jurisdiction over non-Indians in Indian country in matters not affecting Indians or infringing tribal self-government. Here the term "concurrent" refers not to concurrent jurisdiction over the same events and persons, only to concurrent jurisdiction over the same territory but over different persons and subject matters.

[112] *See also* United States v. Lossiah, 537 F.2d 1250 (4th Cir. 1976) (Major Crimes Act prosecution for murder); R. Clinton, Criminal Jurisdiction Over Indian Lands, 18 Ariz.L.Rev. 503, 511 (1977).

[113] New York ex rel. Ray v. Martin, 326 U.S. 496 (1946); United States v. McBratney, 104 U.S. 621 (1882).

[114] Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481-83 (1976); Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906); *see also* McClanahan v. Arizona Tax Com'n, 411 U.S. 164, 179 (1973) (dictum).

The use of "concurrent" in *Hornbuckle* is uncertain, because the decision is a summary affirmance including no discussion of the issue. But it may be that the *dictum* used the word to refer to concurrent jurisdiction over the same persons, subject matter, and events. Concurrent state and federal jurisdiction of this sort should be rejected in the instant cases for a number of reasons.

As already noted Major Crimes Act jurisdiction has been consistently held to be exclusive of state jurisdiction by this Court and the lower federal courts. No valid reason exists to have a different rule for Mississippi or the Choctaws (or for North Carolina). Also, concurrent jurisdiction would be contrary to the protective purpose of Major Crimes Act jurisdiction. *See United States* v. *Kagama,* 118 U.S. 375, 384-85 (1886). A further problem with concurrent jurisdiction over the same persons and events is the double jeopardy issue discussed in the next subsection.

This is not merely a matter of concurrent judicial jurisdiction (such as in diversity cases); most Major Crimes Act offenses have a federal substantive definition and punishment, and these differ from some state definitions. While concurrent jurisdiction over minor offenses might be manageable, the Major Crimes Act covers the most serious crimes. Where one jurisdiction has the death penalty or the felony murder rule but the other does not, the random election of one prosecutor or the other has very serious consequences. In *United States* v. *Antelope,* 430 U.S. 641, (1977), the Court sustained a difference in rule between federal and state

prosecutions of *different* persons, upholding federal authority over Indians as a separate people. But a like disparity of treatment over the same defendant depending only on which jurisdiction determines to prosecute first is much more difficult to justify. As this Court stated in a different context, "If under the control of Congress, from necessity, there can be no divided authority." *The Kansas Indians,* 72 U.S. (5 Wall). 737, 755 (1867).[115]

The considerations outlined here were one factor in the decision in *Youngbear* v. *Brewer,* 415 F.Supp. 807 (N.D.Iowa 1976), *aff'd,* 549 F.2d 74 (8th Cir. 1977), construing an ambiguous statute not to create concurrent state-federal jurisdiction over murder in Indian country in Iowa. That case, like this one, also involved Indian country reestablished after statehood and a removal treaty, and in that respect it conflicts with the decisions below.

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[115] *See also* State v. Campbell, 53 Minn. 354, 55 N.W. 553, 555 (1893), where the court reversed the state conviction of a reservation Indian, observing, "It would never do to have both the United States and the state legislating on the same subject." In a later case this Court said:

> Subjection to both state and national law in the same matter might often be impossible . . . the question is not whether a particular right may be enforced in either a court of the state or one of the nation, but whether two sovereignties can create independent duties and compel obedience . . .
>
> It is true the same act may often be a violation of both the state and Federal law, but it is only when those laws occupy different planes.

In re Heff, 197 U.S. 488, 506-07 (1905). On the merits the Court then decided in favor of state jurisdiction, and in this respect *Heff* was expressly overruled by United States v. Nice, 241 U.S. 591, 601 (1916). However, the quoted language was not questioned or limited in *Nice.*

B. Double Jeopardy Bars the State Reprosecution

The state prosecution below is also barred by the double jeopardy clause of the fifth amendment as applied to the state by the fourteenth amendment. *Benton* v. *Maryland,* 395 U.S. 784 (1969). The Court has held that successive federal and state prosecutions are not barred by the double jeopardy clause under the "separate sovereign" rule. *Bartkus* v. *Illinois,* 359 U.S. 121 (1959); *Abbate* v. *United States,* 359 U.S. 187 (1959).[116] However, these cases arose in the usual context of interstitial federal criminal law, involving at least some difference in definition from the state offense. By contrast Major Crime Act prosecutions will sometimes involve definitions very similar or identical to state law. In the case of burglary and incest, the Major Crimes Act adopts state law to define the offenses, so these offenses are precisely the same in both courts. Also, the societal interest being vindicated in both federal and state prosecutions is the same, the public peace of the Reservation area. The rule of *Bartkus* and *Abbate,* much criticized in any case,[117] should not be extended to the present situation, where the state and federal laws serve the same purposes. (*Cf., Commonwealth* v. *Mills,* 447 Pa. 163, 286 A.2d 638 (1971).

Defendant was acquitted of felony assault by a federal trial jury. His retrial in state court on the same charge based on the same events should be barred by the double jeopardy clause.

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[116] Mississippi follows the same rule. Bankston v. State, 236 So.2d 757 (Miss. 1970).

[117] Fisher, Double Jeopardy, Two Sovereignties and the Intruding Constitution, 28 U.Chi.L.Rev. 591 (1961); Pontikes, Dual Sovereignty and Double Jeopardy, 14 Wes.Res.L.Rev. 700 (1963); Fisher, Double Jeopardy and Federalism, 50 Minn.L.Rev. 607 (1966).

IV. DOUBTS ARE TO BE RESOLVED IN FAVOR OF THE INDIANS AND OF FEDERAL PROTECTION.

Defendant views the applicable laws in this case as reasonably clear and free from doubt, as discussed in the previous sections of this brief. But to the extent that any doubts or ambiguities exist in any of the Indian statutes, it is well established that they are to be resolved in favor of the Indians. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 89 (1918). The Court has applied this rule to favor federal protection and tribal self-government over competing state jurisdiction. *Bryan* v. *Itasca County,* 426 U.S. 373, 392-93 (1976); *McClanahan v. Arizona Tax Com'n,* 411 U.S. 164, 174-75 (1973); *see United States* v. *Kagama,* 118 U.S. 375, 384 (1886).

CONCLUSION

The opinions below ignored numerous controlling decisions of this Court and are at odds with accepted principles of federal Indian law. They should be reversed.

As to Smith John, the Court is requested to remand No. 77-575 to the Supreme Court of Mississippi with instructions to dismiss the charges against him, and to remand No. 77-836 to the Court of Appeals with instructions to decide the appeal on the original issue raised.

As to Harry Smith John, the Court is requested to remand both cases to the lower courts with instructions to dismiss them as moot.

Respectfully submitted,

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APPENDIX

Appendix 1

Act of June 21, 1939, c. 235, 53 Stat. 851

AN ACT

To define the status of certain lands purchased for the Choctaw Indians, Mississippi.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title to all lands purchased by the United States for the benefit of the Choctaw Indians of Mississippi, under authority contained in the Act of May 25, 1918 (40 Stat. L., 573), and similar subsequent Acts, not under contract for resale to Choctaw Indians, or on which existing contracts of resale may hereafter be canceled, is hereby declared to be in the United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior.

Appendix 2

25 U.S.C.

§ 465. Acquisition of lands, water rights or surface rights: appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided,* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and

such lands or rights shall be exempt from State and local taxation.

25 U.S.C.

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by sections 461, 462, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

25 U.S.C.

§ 479. Definitions

The term "Indian" as used in sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in said sections shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in said sections shall be construed to refer to Indians who have attained the age of twenty-one years.

Appendix 3

18 U.S.C.

§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Appendix 4

18 U.S.C.

SECTION 1153. OFFENSES COMMITTED WITHIN INDIAN COUNTRY

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . assault with intent to kill, . . . within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. . . .

• • •

Note: Shown as in force on August 30, 1975. Amended by the Act of May 29, 1976, Pub.L. 94-297, § 2, 90 Stat. 585.

18 U.S.C.

§ 3242. Indians committing certain offenses; acts on reservations

All Indians committing any of the following offenses; namely, . . . assault with intent to kill, . . . on and within the Indian country shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

Note: Shown as in force on August 30, 1975. Amended by the Act of May 29, 1976, Pub.L. 94-297, § 4, 90 Stat. 586.

Appendix 5

Treaty With The Choctaws

September 27, 1830, 7 Stat. 333

. . . Article XIV. Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this Treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvements of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity . . .